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No. 86-160

In the Supreme Court of the United States

October Term, 1985

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Petitioner,

vs.

BOSTON & MAINE CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO THE CROSS-PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the First Circuit

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STATEMENT OF THE CASE

This case arises out of a dispute resulting from unilateral actions taken by the Boston & Maine Corporation ("B&M"), a carrier by rail, subsequent to its lease to the New England Southern Railroad ("NES") of certain of B&M's New Hampshire lines running from Manchester, New Hampshire to Penacook, New Hampshire, a distance of approximately 27 miles (2a).[1] B&M engaged in this unilateral action subsequent to an order of the Interstate Commerce Commission ("ICC") which exempted the lease from the regulatory requirements of the Interstate Commerce Act (*Id.*). First, B&M unilaterally abolished a yard

1. References to the suffix "a" are to the appendix attached to BLE's petition in No. 85-2153 and references to "JA" are to the Joint Appendix in the court of appeals.

switching assignment at Concord, New Hampshire, and informed BLE that NES employees would thereafter perform the switching (3a). Second, B&M unilaterally shortened assignments known as "EDCO/COED" from East Deerfield, Massachusetts to Concord so that B&M employees represented by BLE would work only as far as Manchester, New Hampshire, rather than Concord, and would therefore suffer a corresponding reduction in pay (3a). Third, B&M unilaterally abrogated an agreement dated January 11, 1968, which provided it with certain efficiencies in the operation of unit coal trains in exchange for enhanced rates of pay and other favorable conditions for locomotive engineers (6a and JA at 24, 25 and 67).

B&M's abrogation of the unit coal train agreement involved a three step process. Initially, B&M unilaterally abolished the regularly scheduled assignments on the unit coal trains which previously ran 204 miles from Mechanicville, New York to Bow, New Hampshire. At Bow, the coal cars had been detached at the Public Service of New Hampshire electric generating plant with the engine and caboose then proceeding five miles northward to Concord where the crew would be rested (JA at 15 and 18). B&M replaced the regularly scheduled assignments with new assignments through its spare board at Mechanicville, New York (JA at 20). These assignments were identical to the prior assignments in that they still ran over the 204 mile distance from Mechanicville, New York to Bow. Now, however, instead of proceeding northward five miles to Concord following the delivery of the coal cars at Bow, the engine and caboose are taken southward one mile to the "Perini" track, where the crew is then driven approximately ten or eleven miles to Manchester, New

Hampshire for rest (JA 18-20). As the final step in its abrogation of the unit coal train agreement, B&M informed BLE that it would no longer comply with the agreement on the ground that the introductory words of the agreement referred to "the operation of Special Unit Coal Trains between Mechanicville, New York and Concord, New Hampshire." (JA at 19; 6a). Since locomotive engineers no longer proceeded to Concord after delivering the coal cars at Bow due to the unilateral operational changes B&M had made, B&M contended that it had no obligation to adhere to the terms of the unit coal train agreement (*Id.*). However, prior to this change, when the engine and caboose did not proceed to Concord after delivering the coal cars at Bow, B&M consistently paid engineers in accordance with the unit coal train agreement (JA at 73 and 111-12). The net result of B&M's present action was that through its own unilateral acts, B&M escaped its obligations under the unit coal train agreement. Although delivering the coal cars from Mechanicville to Bow in the same manner as before, B&M paid its locomotive engineers only half of what they were previously paid (JA at 72).

When conferences failed to resolve the dispute, BLE filed suit claiming that B&M's actions constituted a major dispute in violation of B&M's bargaining obligations under the Railway Labor Act ("RLA"), 45 U.S.C. §151, *et seq.* The first count of the complaint challenged B&M's actions with respect to the unit coal train assignments, and the second count challenged B&M's abolishment of the yard switching job at Concord and B&M's shortening of the "EDCO/COED" assignments (JA at 3-11).

Accepting B&M's contention that the unit coal train agreement arguably did not apply to its present operations due to the introductory words of reference in the agree-

ment, the district court found that it lacked jurisdiction over the complaint because it constituted a minor dispute within the exclusive jurisdiction of the National Railroad Adjustment Board (19a). In dismissing the entire case for want of subject matter jurisdiction, the district court did not consider the second count of BLE's complaint concerning the yard switching job at Concord and the "EDCO/COED" assignment (20a).

Affirming, the court of appeals adopted a different approach. As to the second count which had been ignored by the trial court, the court below held that B&M's unilateral changes in the Concord switching job and the EDCO/COED assignments constituted a major dispute in violation of section 6 of the Act, 45 U.S.C. §156 (8-9a). Despite this finding, the court held that the district court nonetheless lacked subject matter jurisdiction. According to the court of appeals, B&M was exempted from the RLA by reason of 49 U.S.C. §11341(a), and BLE's complaint constituted a collateral attack upon the ICC's order which the district court was without authority to entertain (14a).

As to the first count concerning the unit coal train assignment, the court of appeals totally disregarded its analysis in count two relative to a major dispute having arisen from B&M's unilateral actions. Instead, the court approached the subject in a manner similar to the rationale followed by the district court, holding count one raised a minor dispute over which the court lacked jurisdiction (6-7a).

SUMMARY OF ARGUMENT

The first two questions presented by the cross-petition, which seek review as to whether the first count of the complaint concerning the unit coal train constitutes a collateral attack on the ICC order involving the lease of the B&M's New Hampshire lines to NES, are inappropriate for review. These issues are irrelevant in that the unit coal train claim can be resolved without any reference to any trackage subject to the lease exempted by the ICC order. In short, the lease has nothing to do with the operation of the unit coal train, and the first count accordingly is unaffected by the ICC order. Moreover, these questions raise new issues which have not been decided by either the district court or the court of appeals. Certiorari should not be granted on issues that have not been passed upon or considered by the courts below. *See Tacon v. Arizona,* 410 U.S. 351 (1973); *Adickes v. S. H. Kress Co.,* 398 U.S. 144, at 147 n. 2 (1970); *Ellis v. Brotherhood of Railway Clerks,* 466 U.S. 435, at 443 n. 6 (1984).

The third question presented in the cross-petition requests review of whether the few, sporadic instances of dispute handling over lease transactions in the past became an actual, objective working condition which bound BLE to treat all future disputes as minor ones. This issue is not worthy of review by this Court. In any event, this aspect of the petition should be denied, because B&M did not raise the issue in the courts below. *See Tacon v. Arizona,* 410 U.S. 351 (1973).

ARGUMENT

THE ISSUES RAISED BY THE CROSS-PETITION ARE NOT WORTHY OF CONSIDERATION BY THIS COURT AND WERE NEVER ADDRESSED BY THE COURTS BELOW.

BLE agrees with B&M that there exists "confusion and uncertainty over this issue of national importance" concerning the relationship of the [Interstate Commerce Act (ICA), 49 U.S.C. §10101, *et seq.*] and the RLA." (B&M Cross-Petition at p. 13). As B&M correctly points out, there are "presently pending numerous cases which have as their focus this question" concerning the relationship of the ICA and the RLA and "this Court's guidance is necessary to resolve the uncertainty in this area" (*Id.* at 12-13).

While the first and second questions presented in BLE's petition for certiorari (No. 85-2153) would permit this Court to clarify this "confusion and uncertainty" in a direct manner,[2] the first and second questions presented

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2. The first two questions of BLE's petition relate to the decision of the court of appeals on the second count of BLE's complaint and pose the following inquiries:

1. Does the exemption granted a railroad by the Interstate Commerce Commission under 49 U.S.C. §10505 in a lease transaction automatically relieve the carrier from its bargaining obligations under the Railway Labor Act (45 U.S.C. §§151, *et seq.*) and also its obligations to preserve the rules, working conditions and collective bargaining rights of its employees as provided under 49 U.S.C. §11347, thereby depriving its employees of any voice in determining which persons may operate the trains over the leased trackage?

2. Did the court of appeals err in concluding that an action to enjoin what it found to be a clear violation of the Railway Labor Act through unilateral changes in major working conditions by the rail carrier involved

(Continued on following page)

in B&M's cross-petition would not, because B&M's questions raise irrelevant issues.

In regard to the second count of BLE's complaint which is the subject of the first and second questions presented in BLE's petition for certiorari (*see infra*, fn. 2), the adverse employment action at issue took place exclusively within the trackage subject to the lease involved in the ICC order. Specifically, the yard switching job at Concord, New Hampshire which B&M abolished fell within the leased trackage between Manchester and Penacook. Likewise, the shortening of the "EDCO/COED" assignment involved only the trackage from Manchester to Concord, New Hampshire, which also fell within the leased trackage.

In contrast, in regard to the first count of BLE's complaint which is the subject of the first and second questions presented in B&M's cross-petition for certiorari, the adverse employment action at issue did not take place exclusively within the trackage involved in the lease. Specifically, the job assignments at issue in the first count concerned the delivery of unit coal cars from Mechanicville, New York to the Public Service of New Hampshire electric generating plant at Bow, New Hampshire. This entire 204 mile distance was totally unaffected by the lease.[3] In short, BLE's questions deal squarely with the problem, B&M's do not.

Footnote continued—

> in a transaction exempted by the Interstate Commerce Commission is a collateral attack on the Commission's order and, therefore, not within the jurisdiction of the courts?

3. Though the ten mile distance of the unit coal train assignment from Manchester, New Hampshire to Bow, New Hampshire fell within the area from Manchester to Penacook, the lease expressly provided that "B&M shall continue to have the exclusive right to serve for its own account the electric generating plant of Public Service of New Hampshire." (JA at 40).

B&M argues, however, that the unit coal train assignments are affected by the lease, because the engine and caboose no longer travel northward five miles to Concord after delivery of the unit coal cars at Bow, inasmuch as that portion of the trackage is subject to the lease. As a result, B&M argues that the ICC order involving the lease permitted it to not only unilaterally eliminate the five-mile route of the engine and caboose from Bow to Concord, but also permitted B&M to take adverse employment action on the 204 miles of trackage totally unaffected by the lease by unilaterally cancelling the regularly scheduled assignments,[4] instituting newer longer assignments,[5] changing the engineers' resting location,[6] and cutting pay into half for engineers on the unit coal train assignment.[7] Clearly, these adverse employment actions cannot be deemed "necessary to let [B&M] carry out the [lease] transaction," nor can the ICC decision be interpreted

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4. In contrast to the prior regularly scheduled assignments, the unit coal trains are now serviced through rotating assignments at B&M's spare board at Mechanicville (JA at 20).

5. Before these new changes, the unit coal train assignment constituted 209 miles. (204 miles [Mechanicville to Bow] plus 5 miles [Bow to Concord] = 209 miles). Under the new changes, the trip from Mechanicville is now 215 miles, six miles greater than before. (204 miles [Mechanicville to Bow] plus 1 mile [Bow to the Perini track] plus 10 miles [Perini track to Manchester] = 215 miles). The trip back to Mechanicville is now 213 miles, four miles greater than before. (10 miles [Manchester to the Perini] plus 203 miles [Perini track to Mechanicville] = 213 miles).

6. Before these new changes, engineers rested at the Capitol Motor Inn (formerly Howard Johnson's) at Concord, New Hampshire (JA at 18). They now rest at the Queen City Motor Inn at Manchester, New Hampshire (JA at 21).

7. Though engineers still deliver the unit coal cars to the electric generating plant of Public Service of New Hampshire along the same 204 mile route from Mechanicville to Bow, and though they now work longer assignments than before (*see supra*, fn. 5), they no longer enjoy the enhanced rates of pay provided for in the unit coal train agreement (JA at 72).

as anticipating or authorizing these actions. 49 U.S.C. §11341(a).

In any event, resolution of the first count of BLE's complaint can be made without any reference to the ICC order. BLE raises three arguments to support its contention that B&M's action with respect to the unit coal train creates a major dispute. First, BLE contends that B&M's consistent adherence to the unit coal train agreement over the years, even when the engine and caboose did not proceed to Concord after the delivery of the coal cars at Bow, created an actual, objective working condition which B&M was prohibited from unilaterally changing. *Detroit & Toledo Shore Line R.R. v. United Transportation Union,* 396 U.S. 142 (1969). If this argument is accepted, B&M's first and second questions presented in its cross-petition are not germane, because resolution of the dispute is not contingent upon analysis of any of the trackage subject to the lease involved in the ICC order.

Similarly, B&M's questions also become irrelevant if BLE's second argument is accepted. BLE's second argument is that despite the introductory words of reference in the agreement, the unit coal train agreement applies to B&M's present operations because the clear intent of the agreement was to provide for the delivery of coal cars to Bow and, therefore, the agreement's applicability was not affected by the route of the engine and caboose after the delivery of the coal cars. Thus, if the agreement is found to be applicable under B&M's present operations, the effect of the ICC order is irrelevant.

BLE's third argument is that the unit coal train controversy is a major dispute because B&M lacked authority

to unilaterally implement the changes which it contends have rendered the unit coal train agreement inapplicable. This third argument is the only one in which B&M's first and second questions may have any relevancy whatsoever. However, as mentioned previously, even if the ICC order is interpreted as granting B&M the authority to change the assignment in spite of its obligation under the RLA, the ICC order cannot be interpreted as granting B&M the authority to make unilateral changes on the 204 mile route totally unaffected by the lease involved in the ICC order.

In addition, with both courts below having found the unit coal train controversy a minor dispute, neither court ruled upon the first or second question raised in B&M's cross-petition.[8] The Court has consistently held that it will not normally consider issues that have not been addressed by the courts below. *See Tacon v. Arizona*, 410 U.S. 351 (1973); *Adickes v. S. H. Kress Co.*, 398 U.S. 144, at 147 n. 2 (1970); *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435, at 443 n. 6 (1984). Issues on which the court of appeals have not passed are not considered, because the Court does not have the benefit of the lower court's view. *See J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, at 568 (1981). Since the Court will be unaided by any opinions of the courts below and the issues weigh clearly against B&M's position, B&M's cross-petition for certiorari should be denied as to the first two questions presented.

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8. In fact, B&M argued vociferously in its brief and on oral argument to the court of appeals that the dispute was a minor one and that the employees could be awarded lost wages through arbitration if B&M's reading of the bargaining agreement were incorrect. B&M cannot have it both ways, as it is now seeking in this Court.

The same reasoning is equally applicable to the third question presented in the cross-petition. As the basis for granting certiorari as to that question, B&M urges that the decision below that the second count of BLE's complaint raised a major dispute conflicts with this Court's decision in *Detroit & Toledo Shore Line R.R. v. United Transportation Union,* 396 U.S. 142 (1969), to the extent of whether an instance of past handling becomes an actual, objective working condition that binds a union to handle all future disputes in the same manner.

In *Shore Line,* this Court held that the status quo which must be maintained under the RLA "extends to those actual, objective working conditions out of which the dispute arose." *Id.* at 153. Accordingly, the Court noted that a carrier may engage in operational changes apart from the agreement, if, but only if, the carrier has made similar operational changes "for a sufficient period of time with the knowledge and *acquiescence* of the employees to become in reality a part of the actual working conditions." *Id.* at 154. (Emphasis added). In the present case, the court of appeals found that B&M's failure to demonstrate BLE's acquiescence was "fatal to B&M's argument" that the second count raised a minor dispute (8-9a).

The cross-petition for certiorari does not directly challenge the decision of the court of appeals on the score that BLE did not acquiesce in B&M's prior operational changes. Rather, B&M develops a new theory by arguing that "the treatment of disputes caused by the lease of trackage as a minor dispute has become part of the actual objective working conditions." (Cross-Petition at 20). However, B&M did not raise this argument below, and it ought not be permitted to raise this argument for the

first time before this Court.[9] As this Court said in *Miree v. DeKalb County*, 433 U.S. 25, 34 (1977), where an issue has not been "pleaded, argued, nor briefed either in the District Court or the Court of Appeals, we will not consider it." *See also Tacon v. Arizona*, 410 U.S. 351 (1973).

Furthermore, B&M cites no authority for the proposition that the prior handling of a dispute as a minor one creates an actual, objective working condition which binds a union to handle all future disputes in the same manner. B&M cites no conflict between the courts of appeals on this issue, nor does it assert that the decision of the courts below constitutes a departure from the accepted and usual course of judicial procedures.

In addition, this Court rejected such a view in *Shore Line*. In that case, a major dispute was found in the carrier's establishment of outlying job assignments, even though the union initially submitted the matter as a minor dispute before an adjustment board and the board ruled that nothing in the agreement prohibited the carrier from establishing the assignment. 396 U.S. at 146-47, n. 8 and 9. *See also Air Cargo, Inc. v. Local Union 851, International Brotherhood of Teamsters*, 733 F.2d 241, 247, n. 5 and 6 (2d Cir. 1984) (dispute which was initially treated as a minor dispute is nonetheless a major dispute because in resolving

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9. While B&M stated in a vague fashion that "BLE's filing and processing of grievances (time claims) on the leased lines is further, cumulative evidence that this issue is a minor dispute," the thrust of B&M's argument was that B&M's actions did not constitute a unilateral change in working conditions because "B&M's actions in entering into the lease, permitting the lessee to operate trains on the leased track, and reassigning its own employees is consistent with past practice." (Brief of Defendant-Appellee Boston and Maine Corporation before court of appeals at 32-33). At no point did B&M argue that BLE's handling of prior disputes as minor disputes created any actual objective working condition which bound BLE to handle all future disputes in that same manner.

the major/minor dispute dichotomy, courts focus on substance and "do not rely on the labels parties place on their disputes or other 'contentions' or 'maneuvers' of the parties"). Accordingly, B&M has not presented any sufficient reason for this Court to grant its cross-petition for certiorari on its new theory of the case.

CONCLUSION

Based upon the above reasons and authorities, petitioner/cross-respondent Brotherhood of Locomotive Engineers respectfully requests the Court deny the cross-petition for a writ of certiorari.

Respectfully submitted,

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